INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statement	2
Argument	6
Conclusion	9

CITATIONS

Cases:	
Berryhill v. *Pacific Far East Line*, 238 F. 2d 385, certiorari denied, 354 U.S. 938	9
Latus v. *United States*, 277 F. 2d 264, certiorari denied, 364 U.S. 827	8, 9
Lawlor v. *Socony-Vacuum Oil Co.*, 275 F. 2d 599, certiorari denied, 363 U.S. 844	8
Seas Shipping C. v. *Sierzcki*, 328 U.S. 85	6
United Pilots Assn. v. *Halecki*, 358 U.S. 613	9
West v. *United States*, 361 U.S. 118	6
Statute:	
Suits in Admiralty Act, 41 Stat. 525, 46 U.S.C. 742	2

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 546

WILLIAM J. ROPER, PETITIONER

v.

UNITED STATES OF AMERICA, CONTINENTAL GRAIN COMPANY, AND JOHN W. MCGRATH CORPORATION AND ARROW STEAMSHIP AGENCY, INC., TRADING AS ATLANTIC AND GULF GRAIN STEVEDORING ASSOCIATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Maryland (R.P. 2–16)[1] is reported at 170 F. Supp. 763. The opinions in the United States Court of Appeals for the Fourth Circuit (Pet. App. 1–15) are reported at 282 F. 2d 413.

[1] Page references to petitioner's appendix in the court of appeals will be preceded by "R.P."; to the Government's appendix, by "R.G."; to the transcript, by "Tr." Other parts of the record will be referred to as "R."

JURISDICTION

The judgment of the court of appeals was entered on August 30, 1960. The petition for a writ of certiorari was filed on November 25, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the warranty of seaworthiness was applicable to an employee of a stevedoring company engaged at a grain pier in unloading a dead, deactivated vessel utilized solely for the storage of grain and towed to the grain pier for the unloading.

STATEMENT

This action under the Suits in Admiralty Act, 41 Stat. 525, 46 U.S.C. 742, was instituted by petitioner against the United States as owner of the Liberty ship, S.S. HARRY LANE (R. 2). The United States impleaded the Continental Grain Company which in turn impleaded Atlantic and Gulf Stevedoring Associates (R. 29, 59). The libel sought recovery of damages for injuries sustained by petitioner, a foreman employed by the stevedoring company, when a marine leg permanently affixed to the pier gave way while being operated in the discharge of surplus grain stored aboard the deactivated HARRY LANE (R. 2–3). The libel asserted as its basis of liability (1) that the vessel was unseaworthy because the marine leg was defective and (2) that the United States was negligent (R. 3). The undisputed basic facts, as found by the district court and the court of appeals, are as follows:

After World War II, the HARRY LANE was completely deactivated and placed in the James River moth-ball fleet (R.G. 42). In furtherance of the deactivating process, all supplies, stores, and nautical instruments were removed; the pipes, machinery, boilers, and winches were drained and flushed with special preservatives or filled with grease; the steering gear was drained; the propeller and tail shaft were secured; and the rudder till was locked. Additionally, the cargo gear and tackle were stripped and placed in sealed storerooms or between decks; the booms were permanently secured in their sockets; the winches were drained; and the packing was removed from the piston rods (R.G. 38–40). The Coast Guard Certificate of Inspection (necessary for operation as a vessel in navigation) was lifted and the biannual Coast Guard inspections were suspended (R.G. 42).

In 1954, the HARRY LANE, as well as other vessels in the moth-ball fleet, was called upon for storage and warehousing of surplus grain that had accumulated under the agricultural price support program (R.G. 42). These vessels were equipped with special ventilating systems, unlike those found on vessels in active navigation, to preserve the grain properly for long term storage (R.G. 71). The deactivated HARRY LANE was towed to the Norfolk and Western Grain elevator at Norfolk, Virginia, and, after being loaded with surplus grain, was returned to the moth-ball fleet in the James River (R.G. 42, 70).

The HARRY LANE remained with the fleet until September 1956, when she was again towed as a dead

deactivated vessel to the same grain elevator, where the surplus grain was discharged (R.G. 42, 70). She was moved from her mooring in the James River to Norfolk by tugs which provided the entire motive power and steering (R.G. 23–24, 68). A riding master and six men were put aboard her for the handling of mooring lines (R.G. 68), but the command of the ship and her movement was in the tugboat captain (R.G. 23, 24). The only equipment available to the riding master and his men were brought aboard specifically for the movement and consisted of lines, fire hose, boarding ladder, sounding rod, lamps, and electric light clusters that could be powered from shore (R.G. 25, 26). The riding master's duties consisted only of seeing that the ship was properly moored and kept reasonably clean, the storerooms remained sealed, and fire hazards prevented (R.G. 24). Upon arrival at the grain piers, the riding gang was dismissed (R.G. 36, 43). The riding master remained employed during the storage handling period, but was not messed or berthed aboard the dead vessel (Tr. 158). After the unloading was completed, the vessel was returned to the James River fleet (R.G. 42, 70).

The grain was stored in the vessel under an agreement between Continental Grain Company, the lessee of the grain elevator, and Commodity Credit Corporation (Tr. 163, 358–359). Continental, in turn, contracted with Atlantic and Gulf Grain Stevedoring Associates for stevedoring services in connection with the unloading of the vessel (R.G. 54, 58). Petitioner

was employed by the stevedoring company as a foreman and was directing the operation of a "marine leg" at the time he was injured (R.G. 11–13).

The marine leg was permanently attached to and was an integral part of the Continental Grain Company elevator (R.G. 30–31). It was operated by Continental or by expert grain stevedoring companies which it engaged (R.G. 58–59, 67). The marine leg consisted of a large metal housing containing a continuous belt with buckets or scoops which dip into the grain, carrying it up through the housing into the elevator storage bins (R.G. 1–5, 59, R.P. 3). From a control booth, located on the pier, an operator employed by the Continental Grain Company raised and lowered the leg into the hold of the ship which had been placed directly beneath the leg (R.G. 19, 31, 58–59). In the hold was a team of grain handlers under the direction of a foreman who guided the leg downward into the hold and placed it in contact with the grain by the use of wooden plows attached to the marine leg and powered through a system of winches, blocks, and pad-eyes; the handlers guided the grain in the recesses of the hold to the bottom of the marine leg (R.G. 2–5, 12–13, 15–16, 20–21).

Petitioner, an experienced grain handling specialist and skilled in operating the marine leg, was the foreman of the team controlling the operation of the leg in the hold of the HARRY LANE during the unloading operations (R.G. 11–12). He had worked with this particular marine leg over an extended period of time and, as a part of his duties, often inspected the equipment (R.G. 8, 14, 17). On October 2, 1956,

as petitioner was engaged in his duties as foreman, the strap on a block in the marine leg plow system snapped and he was injured by the freed block (R.G. 14–15; Tr. 71–72, 176).

Following trial, the district court entered judgment for the Government. It held, *inter alia*, that the warranty of seaworthiness did not extend to a deactivated vessel of the moth-ball fleet which had been towed to a grain pier merely to facilitate the removal of surplus grain stored aboard.[2]

The court of appeals affirmed (Sobeloff, C.J., dissenting), holding (Pet. App. 6) that this case fell under the rule of *West* v. *United States*, 361 U.S. 118, that

> a deactivated vessel in one of the "moth ball" fleets is * * * dead and withdrawn from navigation, so that there is no warranty of her seaworthiness. Generally, the warranty of seaworthiness would not arise again until the vessel had been put through a major overhaul and she and her appliances and rigging had been reconditioned, restored and recertified.

ARGUMENT

The district court and the court of appeals correctly held that, under the controlling principle of unseaworthiness established in *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85, and applied by this Court in subsequent decisions, including *West* v. *United States*,

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[2] As above noted, p. 2, *supra*, petitioner also alleged that the Government was negligent. This contention, however, was rejected by both the district court (R.P. 4) and the court of appeals (Pet. App. 5). Petitioner has not pursued the contention in this Court.

361 U.S. 118, a shipowner is not liable in the circumstances of this case. The decisions below conform with the rule of those cases, *i.e.*, that, while the warranty of seaworthiness is not restricted to seamen, those who are entitled to its protection must be doing seamen's work and incurring seamen's hazards on a ship "in active maritime service."[1] And, contrary to petitioner's position, there is no conflict with the decisions of other courts of appeals which have applied this principle to varying factual patterns. There is no occasion for further review.

1. This Court's recent decision in *West* v. *United States*, 361 U.S. 118, controls the issues raised in this petition. It was there held that no warranty of seaworthiness runs to an employee of an independent contractor who is working in a vessel that is not in the active maritime service but has been laid up for several years in the moth-ball fleet. In addition, the Court ruled that, in the absence of power in the owner either to supervise or control the work in which an injured employee is engaged, the independent contractor rather than the shipowner must answer for any injuries caused by defects created by the work. It is of no significance that in *West* the independent contractor was repairing the dead vessel and that here the contractor was emptying the moth-balled vessel of grain stored in its hold. The operative factor is that in neither instance did there exist a vessel in the active maritime service. Likewise, the fact that the HARRY LANE had grain aboard is irrelevant; the grain

[1] *West* v. *United States*, 361 U.S. at 121.

was there for the purpose of storage and not as incident to carriage by an active vessel. Similarly, the towing to the pier did not transform the vessel from a floating warehouse into a live ship.

2. Contrary to petitioner's suggestion (Pet. 9), the rationale of the courts below is wholly consistent with *Lawlor* v. *Socony-Vacuum Oil Co.*, 275 F. 2d 599 (C.A. 2), certiorari denied, 363 U.S. 844. In *Lawlor*, the vessel was undergoing an annual overhaul, with no major changes or repairs called for; the ship was very much alive. Also, the vessel had a full crew aboard and the shipowner was in general control of the ship. 275 F. 2d at 601. Thus, the operative facts in *Lawlor* are far removed from those in the present case, where the ship was completely deactivated and in control of the independent contractors for the purpose of the unloading which had not been completed. *Lawlor* and the present case, therefore, are consistent with each other and correctly implement the rule reiterated in *West* as to the extension of the warranty of seaworthiness to shore-based employees, 361 U.S. at 122:

> *It would appear that the focus should be upon the status of the ship,* the pattern of the repairs, and the extensive nature of the work contracted to be done * * * [emphasis added].

The Second Circuit also considered this question in *Latus* v. *United States*, 277 F. 2d 264, certiorari denied, 364 U.S. 827, holding that the fact that the operation being performed on a dead vessel is similar to those performed on a live vessel is immaterial, for,

in the words of Judge Learned Hand (277 F. 2d at 266):

> a ship is either fitted for her duties in all respects, or she is not fitted at all. This does not mean that before she is fit her owner may not be liable to those who come aboard because of his neglect to provide for their safety; but that is quite another matter from imposing upon him the conventional warranty of seaworthiness.' * * *

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JANUARY 1961.

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[1] Petitioner suggests (Pet. 10) that this case presents another question, *viz.*, whether the warranty of seaworthiness (assuming it is applicable at all) attaches to equipment permanently attached to the grain elevator on shore. This question, however, was reached by neither the district court (R.P. 7) nor the court of appeals (Pet. App. 6). Moreover, petitioner's contention has no merit. As in *United Pilots Assn.* v. *Halecki*, 358 U.S. 613, and *Berryhill* v. *Pacific Far East Line*, 238 F. 2d 385 (C.A. 9), certiorari denied, 354 U.S. 938, the equipment used here was not of a type normally employed by seamen aboard ship. On the other hand, in the *Pope & Talbot* line of cases relied on by petitioner (Pet. 10), traditional seamen's equipment was being used.

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